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FILED
NOV 9 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1472

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

MICHAEL A. HADDLE,

Petitioner,

v.

JEANETTE G. GARRISON; DENNIS KELLY; G. PETER MOLLOY JR.; HEALTHMASTER, INC.; CHRISTOPHER GARRISON, individually and as Trustee for certain trusts; and JOHN DOES 1 through N, individually and as Trustees of certain trusts,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF OF RESPONDENTS JEANETTE G. GARRISON; HLM, INC. (F/K/A HEALTHMASTER, INC.); AND CHRISTOPHER GARRISON

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Pursuant to Rule 25.5 of the Rules of the Supreme Court of the United States, Respondents Jeanette G. Garrison, HLM, Inc. (f/k/a Healthmaster, Inc.) and Christopher Garrison file this supplemental brief to bring to the Court's attention a decision of the Court of Appeals of the State of Georgia issued subsequent to the filing of the briefs in this case. In *Robins Fed. Credit Union v. Brand*, No. A98A1445, 1998 WL 637153 (Ga. App. Sept. 17, 1998), *petition for cert. filed* (Ga. Oct. 13, 1998) (No. S99C0119)[1], the Georgia Court of Appeals directly addressed the issue of whether or when, under Georgia law, an employee has a property interest in his or her employment. A core issue in this case is whether Petitioner Michael A. Haddle had a property interest in his at will employment and, therefore, stated a claim for damages under 42 U.S.C. § 1985(2).

The plaintiffs in *Robins Fed. Credit Union* were employees of a credit union created and operated under the Federal Credit Union Act, 12 U.S.C. § 1751, *et seq*. The plaintiffs brought state law actions for wrongful termination and tortious interference contending that they were afforded protection against discharge under Georgia law because, as employees of a federal credit union, they were public employees. The Court of Appeals first restated the limited "public employee" exception to at will employment:

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[1] The *Robins Fed. Credit Union* decision is reprinted in full in the appendix to this brief. The decision first was published on November 4, 1998, in the *Fulton County Daily Report*.

> Under Georgia law, a public employee has a property right interest in his or her job whenever the employee may be dismissed only for cause. This is a recognized "public employees" exception to the at will statute, OCGA § 34-7-1.

Id. at *1 (citation omitted).

The Court of Appeals then went on to find that the "public employee" exception did not apply:

> However, as federal credit unions are not federal agencies, employees of federal credit unions are not public employees within the meaning of OCGA § 34-7-1, and no exception to this statute exists to which the credit union employees can claim benefit.

Id.

The Court of Appeals also stated:

> Judicially created exceptions to OCGA § 34-7-1 or any other statute are not favored under Georgia law. This principle applies even when termination of employment is alleged to have been in retaliation for legitimate employee conduct.

Id. at *2.

The Court of Appeals rejected the plaintiffs' argument that the Federal Credit Union Act created a "property right" in their employment. Noting that this Court held in *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985) that property interests are not created by the Constitution but, instead, must be found from "'an independent source such as state law'" *Id.* (quoting *Loudermill*, 470 U.S. at 538), the Court of Appeals concluded:

> If state law determines whether a public employee has a property interest in his or her employment, it also will determine whether a *private sector employee has a property interest.* Under existing Georgia law, there is no public policy exception to OCGA § 34-7-1 in favor of the credit union employees.

Id. (emphasis added).

The Court of Appeals in *Robins Fed. Credit Union* made clear that, without exception, private, at will employees under Georgia law have no property interest in their employment.

This holding is in substance a restatement of Georgia law established over 100 years ago. *See Mondon v. Western Union Tel. Co.*, 23 S.E. 853, 855 (Ga. 1895)

(contract for one month could be terminated at will by employee or employee after expiration of month); *Odum v. Bush*, 53 S.E. 1013, 1016 (Ga. 1906) ("[T]he hiring . . . being indefinite as to its duration, may be terminated at the will of either party."). *See also*, Georgia Civil Code 1895 § 2614, now codified as O.C.G.A. § 34-7-1 ("An indefinite hiring may be terminated at will by either party.").

Petitioner is not a public employee who may be dismissed only for cause. Absent being such an employee, Petitioner is under Georgia law an at will employee with no property interest in his employment. Petitioner has not suffered an injury to person or property and does not state a claim under 42 U.S.C. § 1985.

Respectfully submitted,

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APPENDIX

Robins Fed. Credit Union v. Brand A98A1445, 1998 WL 637153 (Ga. App. Sept. 17, 1998), *petition for cert. filed* (Ga. Oct. 13, 1998) (No. S99C0119)

JOHNSON, Presiding Judge.

***1** Following the grant of their application for interlocutory review, Robins Federal Credit Union and Edward Levins (the credit union) appeal a state court order denying their second motion for summary judgment. The credit union is a federal credit union chartered pursuant to the Federal Credit Union Act, 12 USC § 1751.

This suit arises from claims of wrongful termination, tortious interference with shareholder rights, and breach of fiduciary duty. The credit union and Levins removed the action to federal court. However, the United States District Court granted a motion to remand brought by appellee credit union employees, D. Ronnie Brand, Peggy Correia, Harry Moore and Duncan Smith. The District Court held that the employees had no right of action under the Federal Credit Union Act, 12 USC § 1751 et seq., and that upon remand, the state court would be limited to a consideration of the employees' right to relief under Georgia law. *Brand v. Robins Federal Credit Union*, 969 F. Supp. 778, 780(6, 7) (M.D. Ga. 1997).

The issue in the present case is whether the credit union employees were terminable at will or are afforded protection against discharge under Georgia law because they are employees of a federal agency. The trial court concluded inter alia that: (i) the credit union was an agency of the federal government and not a private employer, (ii) the credit union employees were quasi-government employees and had a vested property interest in their employment, and (iii) the credit union

employees could not be fired without cause (thereby impliedly recognizing a public policy exception for quasi-government employees to the "at will" statute, OGGA § 34-7-1). For reasons that follow, we reverse this ruling by the trial court.

1. Is the Robins Federal Credit Union a federal agency? After a thorough review of both Georgia and federal law, we conclude that it is not.

The term "federal credit union" means a cooperative association organized in accordance with Chapter 14, 12 USC § 1751 et seq., for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes. 12 USC § 1752(1). The control and management of a federal credit union is not vested in the federal government but in its membership and their duly elected board of directors. *Jesinger v. Nevada Federal Credit Union,* 24 F.3d 1127, 1132(4,5) (9th Cir. 1994). Although credit unions are subject to a unique amount of governmental control under the Federal Credit Union Act, they are not federal agencies. *See Id.*; *Cuenca v. Safeway etc., Federal Credit Union,* 188 Cal. App. 3d 985, 225 Cal. Rptr. 852, 857(8) (1986); *see also Northeast Federal Credit Union v. Neves,* 837 F.2d 531, 535 (4) (1st Cir. 1988); *cf. Morast v. Lance,* 807 F.2d 926, 929 (2,3) (11th Cir. 1987).

2. Under Georgia law, a public employee has a property right interest in his or her job whenever the employee may be dismissed only for cause. *Maxwell v. Mayor &c. Savannah,* 226 Ga. App. 705, 707 (1)(487 S.E.2d 478)(1997). This is a recognized "public employees" exception to the at will statute, OCGA § 34-7-1. However, as federal credit unions are not federal agencies, employees of federal credit unions are not public employees within the meaning of OCGA § 34-7-1, and

no exception to this statute exists to which the credit union employees can claim benefit. We cannot agree with the contention that there exists a class of "quasi-public employees" who should be included within the "public employee" exception to OCGA § 34-7-1.

***2** Judicially created exceptions to OCGA § 34-7-1 or any other statute are not favored under Georgia law. This principle applies even when termination of employment is alleged to have been in retaliation for legitimate employee conduct. For example, in *Evans v. Bibb Company,* 178 Ga. App. 139 (1) (342 S.E.2d 484)(1986), this court would not judicially create "a public policy exception to an employer's right to discharge an employee at will when the right is exercised in retaliation for the employee's assertion of his rights" under the Georgia Workers' Compensation Act. "The courts of this state have consistently held that they will not usurp the legislative function, and, under the rubric that they are the propounders of 'public policy,' undertake to create exceptions to the legal proposition that there can be no recovery in tort for the alleged 'wrongful' termination of the employment of an at-will employee . . . . Georgia courts have refused to acknowledge any exceptions not encompassed by OCGA § 34-7-1, and in the absence of any express statutory provision for such a civil remedy, we decline to create judicially such a remedy." (Citation and punctuation omitted.) *Jellico v. Effingham County,* 221 Ga. App. 252, 253, 471 S.E.2d 36 (1[illegible]); *accord Borden v. Johnson,* 196 Ga. App. 288, 289-290 (1[illegible], 395 S.E.2d 628 (1990); *Evans, supra.*

3. The credit union employees, principally relying upon a broad interpretation of *Cleveland Bd. of Education v. Loudermill,* 470 U.S. 532, 105 S. Ct. 1487, 84 L.E.2d 494 (1985), contend that they were vested with property rights in

their employment pursuant to various provisions of the Federal Credit Union Act and therefore have a right of action for wrongful termination under Georgia law. We disagree.

As determined in *Brand, supra*, the credit union employees had no express or implied private right of action under the Federal Credit Union Act. If the Federal Credit Union Act had created any form of property right in their employment, the employees' termination should have resulted in a cause of action arising under the Act.

Since the credit union was not a public agency and since the credit union employees were not public employees under Georgia law, the employees cannot claim a public employee exception to the employment at-will statute. Moreover, mere status as a public employee would not, standing alone, support the granting of a public policy exception. *Compare Maxwell, supra* at 707 (1), 487 S.E.2d 478, where a public employee was found to have a sufficient property right in his employment because he could only be terminated for good cause.

Loudermill, supra at 538, 105 S. Ct. 1487, held that property interests are not created by the Constitution but are created and their dimensions are defined "by existing rules and understandings that stem from an independent source such as state law." This holding is silent regarding whether a provision of the Federal Credit Union Act could constitute "an independent source" creating a property right in private sector employment which, although insufficient to give rise to an express or implied right of action under the Act, could give rise to a state cause of action for wrongful termination. However, in *Warren v. Crawford,* 927 F.2d 559, 562 (3) (11th Cir. 1991), it was held: "The Fourteenth Amendment protects against the government's deprivation of liberty or property without

procedural due process. [Cit.] *State law* determines whether a public employee has a property interest in his or her job. [Cit.]" (Emphasis supplied.) If state law determines whether a public employee has a property interest in his or her employment, it also will be determinative whether a private sector employee has a property interest. Under existing Georgia law, there is no public policy exception to OCGA § 34-7-1 in favor of the credit union employees. Finally, we note that *Loudermill,* relied upon by appellees, is distinguishable on its facts; *Loudermill* was classified as a civil servant under Ohio law and by state statute could only be terminated for cause.

**3 Judgment reversed.*

Smith, J., and Senior Appellate Judge Harold R. Banke concur.